

rates for residential service in Meadowview are less than \$16.00 per month. If Cingular were allowed to resell that service and, moreover, to take a discount off that rate, it would reap an uneconomic windfall. The costs of an efficient provider *actually serving* that portion of the market are well above \$44.34 per line, but the costs Cingular would incur would be less than \$15. This is unacceptable as a matter of rule and public policy.

Assuming, as we should, that Cingular would report its customer counts correctly to the Universal Service Administration Company it is true that Cingular would not (and should not) receive federal universal support for its resale customers. However, the support that Cingular *would* receive for its higher-density customers in the southern portion of the wire center is based on a wire center average cost of \$44.34. And that figure, \$44.34, is only as high as it is because of the higher-cost, northern portions of the wire center that Cingular has managed to avoid actually serving. Therefore, Cingular would reap the benefits of uneconomic arbitrage—cream skimming—even while purporting to serve the entire wire center, and customers would ultimately suffer.

To summarize this example of Meadowview, the facts are as follows:

Fact #1: Cingular has limited its network to the lowest-cost portions of the wire center.

Fact #2: By using resale in the high-cost portions Cingular meets its obligation to “serve” all customers in the wire center but actually avoids the costs of doing so.

Fact #3: By selectively incurring only low costs, and selectively avoiding high costs, Cingular’s cream-skimming *within* the Meadowview wire center is no different than the cream-skimming across wire centers the Commission has denounced.

Fact #4: The USF support dollars Cingular would receive in Meadowview are based on the cost of serving the high-cost areas, areas that Cingular has avoided. And most importantly...

Fact #5: The example of Meadowview is repeated over and over in the vast majority of Embarq wire centers in Virginia.

Appendix A provides a discussion and a series of maps depicting the coverage of Cingular in Embarq's Virginia serving territory. Of the ninety wire centers in Embarq's region, Cingular appears to offer only partial coverage in over fifty (50) of them, and it offers *no* coverage in an additional twenty-one (21). In many cases the "partial" coverage amounts to no more than a fraction of the wire center's overall area, most often in a population center or along a highway or interstate. Individual maps of a few representative wire centers are included, demonstrating that in some cases Cingular's "coverage" represents as little as 3% of the area. In sum, Cingular serves 3034 square miles of Embarq's 9698 square miles of service territory in Virginia, which is just 31.28% of the area for which universal service support is provided on an average-cost basis. Moreover, the average population density and cost of service are markedly lower in the areas Cingular does serve. Even if Cingular intends to use resale of some form to provide service in the remaining 6664 square miles of the service territory, it is apparent that there are significant risks of cream skimming. Moreover, it is also apparent that the Petition puts at risk support for the majority of these rural areas in the hope of benefiting a much smaller part of the area. Given the dramatic absence of anything resembling ubiquity of coverage, the Commission is duty-bound to consider the impacts of cream-skimming and to investigate.

In previous discussions regarding cream-skimming the Commission has used a comparative density analysis to determine whether the petitioning carrier was selectively serving lower-cost areas. Historically, these density comparisons have been made at the wire center level. In particular, in *Virginia Cellular* the Commission denied granting ETC status in one specific rural incumbent LEC's study area "... because Virginia Cellular would only have served

the lowest cost, highest density wire center within [that] study area.”¹⁴ Embarq submits that there is no fundamental reason that wire centers should be the only basis for a comparative density analysis. An analysis should be conducted to determine if Cingular is selectively covering and serving only the “lowest cost, highest density” *portions* of Embarq’s wire centers, or of its overall study area. If so, the cream-skimming is no less real and no less problematic than that which caused the Commission to deny ETC status for the one rural area in *Virginia Cellular*. And, as described above, a casual commitment to use “resale” to fulfill service obligations does not mitigate the negative effects of the cream skimming.

Finally, Cingular may not lay the cream-skimming problem at Embarq’s feet by claiming that Embarq should have disaggregated its support. As the Commission wrote in *Highland Cellular*:

32. As we discussed in the *Virginia Cellular Order*, when a competitor serves only the lowest-cost, highest-density wire centers in a study area with widely disparate population densities, the incumbent may be placed at a sizeable unfair disadvantage. Universal service support is calculated on a study-area-wide basis. Although Verizon South did not take advantage of the Commission’s disaggregation options to protect against possible uneconomic entry in its lower cost area, we find on the facts here that designating Highland Cellular as an ETC in these requested wire centers potentially could undermine Verizon South’s ability to serve its entire study area. Specifically, because Verizon South’s study area includes wire centers with highly variable population densities, and therefore highly variable cost characteristics, disaggregation may be a less viable alternative for reducing creamskimming opportunities. This problem may be compounded where the cost characteristics of the incumbent and competitor differ substantially. We therefore reject arguments that incumbents can, in every instance, protect against creamskimming by disaggregating high-cost support to the higher-cost portions of the incumbent’s study area.¹⁵

¹⁴ *Virginia Cellular* ¶ 35.

¹⁵ *Highland Cellular* ¶ 33.

2. *Cingular Has Not Shown that Granting It ETC Status Would Offer an Overall Beneficial Increase in Customer Choice or Unique Advantages in Its Service Offerings for Most Customers.*

A fundamental problem with the Petition is that the claimed benefits are small, while the likely costs are large. Cingular states that it will use the high-cost funds to increase its network coverage, but its current network coverage is so sparse, at least in Embarq's service area that Cingular cannot credibly claim that it will offer anything approaching ubiquitous coverage. Instead, Cingular must intend to rely heavily on resale of other networks to fulfill ETC service obligations. As mentioned above, neither Embarq nor any other interested party has had an opportunity to review Cingular's build-out plans. Therefore, Embarq's analysis relies, as it must, on common sense and logical inference from known facts. Once a protective order is entered and Embarq has had an opportunity to fully review the Petition, Embarq will update its analysis.

The Commission has established criteria by which it determines whether an ETC designation is consistent with the public interest. As the ETC applicant, Cingular must prove that designating it as an additional ETC in Virginia will serve the public interest. The Commission "takes into account the benefit of increased consumer choice when conducting its public interest analysis," and "also considers the particular advantages and disadvantages of an ETC's service offering."¹⁶ Cingular attempts to meet its burden of proof on these public interest factors by claiming that it will build some additional cell sites "to improve quality of service and extend telephone service to individuals and businesses that currently have no choice of telephone provider."¹⁷ Cingular also claims that the "mobility of Cingular's wireless service will provide

¹⁶ *ETC Designation Order* ¶ 44.

¹⁷ Petition, at 14.

further benefits to consumers,” and “the availability of mobile data services on Cingular’s network is a public interest benefit to subscribers of Cingular’s universal service offering.”¹⁸

Cingular’s coverage is sparse throughout Embarq’s service area. As described above, Cingular has coverage in only about one-third of the service area. More importantly, there are twenty-one wire centers where Cingular has no coverage at all, and fifty wire centers in Embarq’s territory where Cingular has only partial coverage. Logically, therefore, Cingular cannot credibly plan to use high-cost support to do more than modestly increase its coverage area, which will only benefit a comparatively small number of customers, most of whom would have service in any event. Conversely, the funds that Cingular would receive are currently being used by other ETCs to bring the benefits of universal service to large numbers of customers, many of whom may not have any other service alternative. Finally, even if Cingular were to offer improvements in a few parts of the requested service areas, this would not begin to justify the resale arbitrage it apparently intends to pursue throughout the rest of the service areas.

In a nutshell, the problem with the Petition, like so many other wireless ETC petitions, is that it seeks to divert funds intended to bring the benefit of telecommunications service where it would not otherwise be available and use them to modestly increase wireless coverage where customers already have telecommunications service. This is directly contrary to the principle of universal service, and the mandates of the Communications Act. Accordingly, Cingular cannot meet its burden of proving that the public interest would be served through ETC designation.

¹⁸ Petition, at 14-15.

3. *Granting Cingular ETC Status Would Be
Harmful to Universal Service Support.*

Cingular does not address anywhere in the Petition how adding another ETC will benefit consumers in the rural areas of the Commonwealth of Virginia, such as those served by Embarq. Embarq submits that multiple ETC will harm rather than help customers in these areas and, accordingly, that the public interest will not be served by adding yet another ETC. Therefore, Cingular's petition should be denied.

The Communications Act established different public interest standards for additional ETCs in rural and non-rural areas because there is a clear difference in the cost-benefit analysis between the two areas. Rural areas are more sparsely populated and, hence, less able to support multiple telecommunications service providers. Telecommunications networks exhibit considerable economies of scale and density, so reducing the number of customers served can significantly increase the average cost of service for all customers. Therefore, having too many providers in a rural market can make it uneconomic for any of them to provide service. Consequently, adding additional ETCs in rural areas can, in fact, harm consumers by driving up the average cost of providing service for all providers. This will either thwart the national policy goal of universal service or put substantial additional demand on the high-cost fund (and any associated state universal service fund).

The public interest would also be disserved should Cingular be permitted to use purchase services at below-cost rates and resell them to satisfy the requirement of section 214 that it provide service throughout the area where it would be designated as an ETC. This would produce dramatically uneconomic arbitrage and could threaten the viability of universal service support. Instead, Cingular should only be permitted to use the resale option under section 214 when it pays rates that cover the actual cost of providing the services being resold. Nor can

Cingular avoid its obligation by claiming that the cost of obtaining services for resale is “unreasonable.”

The Petition is also deficient to the extent that Cingular may seek to rely on reselling Embarq’s retail service to serve some of the over 6000 square miles of territory (nearly 70% of the total are) in the Embarq service territory. Embarq’s retail services are often sold at regulated rates, however, that do not cover the cost of providing service because they are averaged across lower-cost and higher-cost areas. Neither the Act nor the Commission’s rules can rationally be read in such a way that an ETC may take support in low-cost areas while using resale to avoid incurring the cost of providing service in high-cost areas. Accordingly, Cingular would need to negotiate with Embarq to establish suitable rates for obtaining service for resale. Only then would Cingular be able to demonstrate that it could, in fact, to provide the supported services throughout the area for which it seeks ETC designation.

B. The Cingular Petition Does Not Satisfy The Specific Requirements Of The *ETC Designation Order*.

The Petition should also be denied because it does not satisfy the specific requirements of the *ETC Designation Order*. It is important at the outset of this analysis to remember that Cingular bears the burden of proof on this point. The requirements were set out in the *ETC Designation Order*:

Based on the record before us, we find that an ETC applicant must demonstrate: (1) a commitment and ability to provide services, including providing service to all customers within its proposed service area; (2) how it will remain functional in emergency situations; (3) that it will satisfy consumer protection and service quality standards; (4) that it offers local usage comparable to that offered by the incumbent LEC; and (5) an understanding that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act.¹⁹

Cingular has not met its burden of proof on several of these elements; in fact, the Petition raises more questions than it answers. Notably, it is not clear how Cingular can even make a credible commitment to provide the supported services to all requesting customers in its proposed service territory. In addition, Cingular's coverage is so lacking in Embarq's service area that one cannot imagine how it can, on balance, show that the universal service funds will improve coverage, signal strength, or capacity overall compared with what would happen should Cingular not receive universal service support.

Cingular Cannot Make a Credible Commitment to Provide the Supported Services to All Requesting Customers in Embarq's Service Areas. Cingular has stated in the Petition that it will provide the Supported Services to all requesting customers in the entire Commonwealth of Virginia, including Embarq's services areas, which are designated as rural areas. As described above, Cingular currently has coverage in very little of Embarq's service areas—only about one-third of the overall service area. While the Act states that an ETC may use a combination of its own facilities and resale to provide service,²⁰ surely it cannot satisfy this obligation by using exclusively or predominately resale in the high-cost portions of the areas where it seeks ETC designation. In any event, Cingular must prove that it will, in fact, be capable of providing

¹⁹ *ETC Designation Order*, ¶ 20.

²⁰ 47 U.S.C. § 214(e).

service *everywhere* in Embarq's service areas. This is fundamental to the very definition of universal service, and it would undermine the entire system of universal service support to allow some ETCs to receive support while failing to provide *universal* service in return.

Additionally, even if Cingular were planning on using roaming agreements to meet its obligation to offer service throughout the area in which it is an ETC, a substantial part of Embarq's service area appears to be without any coverage from a commercial mobile radio service (CMRS) provider. In those places, Cingular would have to resell landline service. Cingular does not even have a resale agreement with Embarq, however, and while Embarq may be required to allow Cingular to resell its services, at least once Cingular were to be certified as a competitive local exchange carrier (which it is not), this would have to be negotiated.

Finally, Cingular is required to advertise the supported services throughout its ETC areas. Cingular apparently is intending to satisfy its obligation, at least in part, in Embarq's service areas by reselling *landline* telecommunications services because of the extent to which wireless service is unavailable. Cingular also fails to prove that it can meet this requirement because it is certified as a CLEC in Virginia. Therefore, Cingular cannot meet the very obligation it is claiming that it will meet. Moreover, even if Cingular were to be certified as a CLEC it would also have to develop some measure of expertise and develop some customer awareness of its *landline* local exchange services before it could credibly rely on reselling Embarq's local services to satisfy ETC obligations. It could not simply advertise its CMRS services as this would fail to meet its obligation to advertise its services throughout the area in which it were designated as an ETC.

Cingular Cannot Demonstrate that, On Balance, It will Improve Service for Customers.

The Commission adopted the further requirement in the *ETC Designation Order* that an ETC applicant:

demonstrate its commitment and ability to provide supported services throughout the designated service area ... by submitting a formal network improvement plan that demonstrates how universal service funds will be used to improve coverage, signal strength, or capacity that would not otherwise occur absent the receipt of high-cost support.²¹

Cingular simply states that its five-year plan is attached as confidential information. The Petition contains no analysis of how any improvements funded by universal service support will, on balance, benefit customers in the area. This is critical—the obligation cannot be satisfied simply by improving service for some cellular customers at the cost of depriving support that was used to provide essential supported services to other customers. Instead, the benefits and harms to customers must be weighed against each other and the ETC must, on balance, improve universal service. The public interest demands no less, and Cingular has failed to meet this burden.

Cingular Cannot Show That It Could Provide Equal Access if Called Upon to Do So.

While a Commissioner, Chairman Martin would have imposed an equal access obligation on all ETCs.²² This seems sensible, yet the Commission declined to do so. Yet, the Commission did adopt an obligation for ETC applicants that they be prepared to offer equal access:

Although we do not impose a general equal access requirement on ETC applicants at this time, ETC applicants should acknowledge that we may require them to provide equal access to long distance carriers in their designated service area in the event that no other ETC is providing equal access within the service area.²³

²¹ *ETC Designation Order* ¶ 23.

²² *ETC Designation Recommended Decision Statement, supra.*

²³ *ETC Designation Order*, ¶ 35.

The Petition is largely silent on this point, simply acknowledging the text of the rule. This cannot satisfy Cingular's burden of proof on this point. Instead, Cingular must offer some credible evidence that it could, in fact, comply with such a requirement. Otherwise, the Commission's requirement would be devoid of purpose and ETCs could, in practice, flout the Commission's rules by merely "mouthing" the acknowledgment while having no intent or capability to comply with an equal access requirement.

Cingular does not offer equal access today, and it seems certain that it would cost for Cingular to develop the capability if, indeed, it could even do so using its current switching technology. The Commission should, therefore, require Cingular to come forward with credible and sufficient evidence demonstrating how it will offer equal access should it be so required.

**C. The Petition Is Inconsistent With The
Objectives Of The Communications Act.**

Cingular's Petition should be rejection for a third reason—it is inconsistent with the objectives of the Communications Act. Universal service support is intended under the Act to replace implicit subsidies, and it should be used to support the cost of providing service where it would not be economically feasible to do so. Therefore, universal service support should be tied to true carrier of last resort obligations, by which incumbent local exchange carriers (ILECs) such as Embarq are required to build network facilities where they would not otherwise do so because it is not economically feasible. Carrier-of-last-resort regulations also require Embarq and other ILECs to provide service at rates that do not cover the cost of providing service. In this way, ILECs such as Embarq, fulfill the national policy goal of providing affordable, and high-quality, telecommunications services universally. Embarq and other ILECs welcome their role in serving all Americans, but the Commission and state regulators must not, and indeed

cannot, require Embarq and other ILECs to provide universal service without adequate compensation.

The Telecommunications Act of 1996 mandates “specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.”²⁴ The current federal high-cost support mechanisms continue to rely on carrier-of-last-resort obligations to ensure that the supported services are, in fact, available to all customers. Those obligations still apply only to ILECs, and support is provided based on average costs incurred across ILEC study areas. Therefore, as Commissioner Martin noted in 2004, it is important that competitive ETCs only receive support where they fulfill comparable obligations across comparable geographical areas:

I would have preferred that the Joint Board recommend that the Commission require ETCs to provide the same type and quality of services throughout the same geographic service area as a condition of receiving universal service support. In my view, competitive ETCs seeking universal service support should have the same “carrier of last resort” obligations as incumbent service providers in order to receive universal service support. Adopting the same “carrier of last resort” obligation for all ETCs is fully consistent with the Commission’s existing policy of competitive and technological neutrality amongst service providers.²⁵

Competitive neutrality will be violated and, ultimately, the entire system of universal service will unravel if competitive ETCs are able to receive support without incurring comparable service obligations across comparable geographical areas. The system is designed to work when all ETCs are providing service where it is not economically feasible to do so otherwise, and at rates that do not cover the costs of providing service. A corollary of this point is that, where a competitive ETC is not using its own network to provide service throughout the

²⁴ 47 U.S.C. § 254(b)(6). This mandate has not been fulfilled at the federal level. Nor, has it been fulfilled in most states. Embarq is not addressing these deficiencies in this pleading, however.

²⁵ *ETC Designation Recommended Decision Statement, supra.*

same geographic area as the ILEC, it is *not* incurring the same carrier of last resort obligations as is the ILEC. In these circumstances, a competitive ETC may not be using universal service funds appropriately. Instead, it may be reaping a windfall by collecting support solely for providing service where it could do so without support.

Embarq and other ILECs do use universal service support appropriately because they fulfill carrier of last resort obligations that require them to build network where they would not do so otherwise, and to provide service to customers at rates that do not cover the cost of providing service. The difference between costs and rates has been made up through rate averaging and higher rates to customers in low-cost areas. Cingular has not faced similar requirements however and, presumably, its current network was built where it was economically feasible to build and operate such a network *in the absence of support*. Accordingly, there is no public policy justification for providing universal service support to Cingular for its current network; doing so would only provide Cingular with an unwarranted windfall.

Cingular claims in the Petition that it will build additional cell sites,²⁶ presumably extending its network beyond where it was economically feasible to deploy facilities in the absence of support. A problem with the Petition, however, is that Cingular's coverage is so sparse in many of the wire centers where it seeks designation, however, that Cingular cannot credibly commit to providing service using its own facilities in such as way as to incur carrier-of-last-resort obligations that are remotely comparable to those incurred by Embarq and other ILECs. Therefore, granting Cingular ETC status will violate competitive neutrality and ultimately threaten universal service.

²⁶ Petition, at 14.

**II. THE COMMISSION SHOULD SUSPEND CONSIDERATION
OF THE PETITION PENDING COMPLETION OF ITS
REVIEW OF THE HIGH-COST SUPPORT MECHANISMS**

The Commission should suspend consideration of the Petition pending review of the high-cost support mechanisms. As Chairman Martin noted while serving as Commissioner, individual ETC petitions “may prejudice the on-going work of the Federal-State Joint Board regarding the framework for high-cost universal service support.”²⁷ The Commission should not allow for the possibility of distractions from this important industry-wide review, particularly given that pending applications could be rendered moot by Commission action on a Joint Board recommendation.

The Petition is directly implicated in the Commission’s broader review of high-cost support in at least two ways. First, ETC petitions are putting pressure on the Commission to consider broad policy issues in a piece-meal fashion when they should be considered together in a larger rulemaking.²⁸ There are substantial interactions between the individual rules and policies that collectively make up universal service support. When they are considered in isolation, it is difficult to make decisions effectively. Instead, decisions that may seem rational can turn out to have unintended and undesirable effects. Therefore, isolated decisions can interfere with and disrupt the Commission’s broader (and more important) review of high-cost support mechanisms.

Second, any decision that is taken on the Petition will itself be subject to the outcome of the Commission’s broader review of high-cost support. Therefore, Commission or Bureau action could subject the parties involved to unnecessary effort and expense both in the process of

²⁷ *Virginia Cellular Dissent, supra.*

²⁸ *See, e.g., Virginia Cellular; Highland Cellular.*

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reviewing the Petition and acting on any decision in the market. Moreover, customers could easily be inconvenienced when the Commission does complete its broader review of high-cost support and companies respond to any new policies or procedures. Accordingly, Embarq urges the Commission to not act on the Petition until the universal service reform proceeding, including analysis of reverse auctions, is completed.

III. CONCLUSION

Cingular's Petition should be denied because it (1) fails to comply with the requirements established by the Commission in the *ETC Designation Order*; (2) is against the public interest; and (3) is inconsistent with the objectives of the Communications Act. In addition, the Commission should suspend review of the Petition pending review of the high-cost support mechanisms.

Respectfully submitted,

EMBARQ CORPORATION

By: 

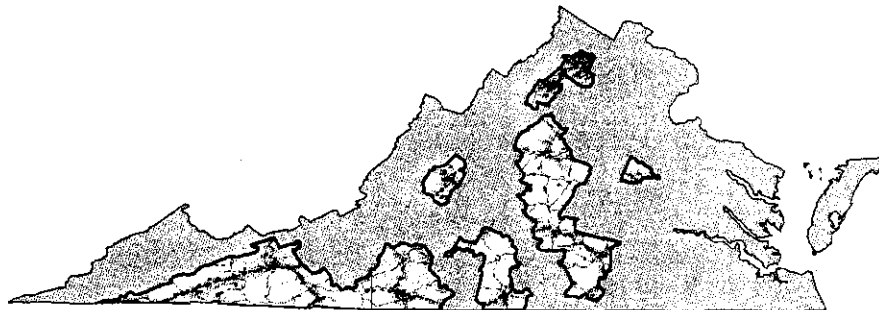
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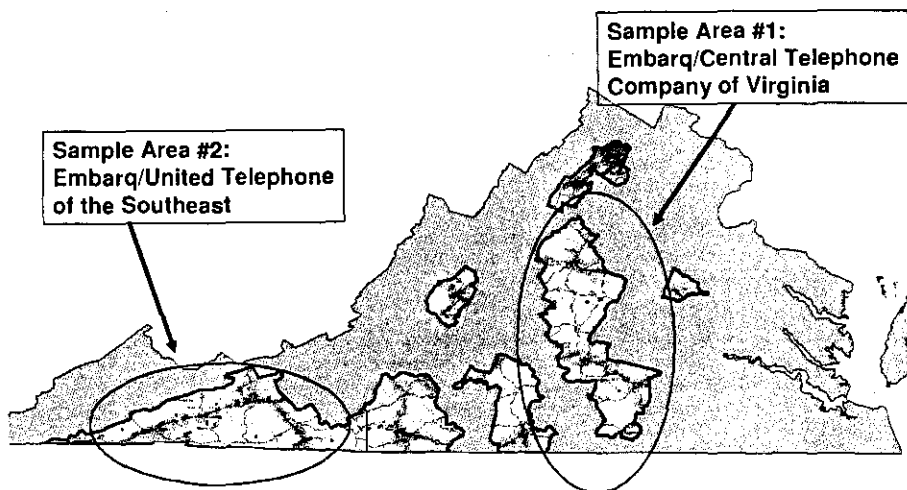
APPENDIX A

Embarq Serving Territory in Virginia



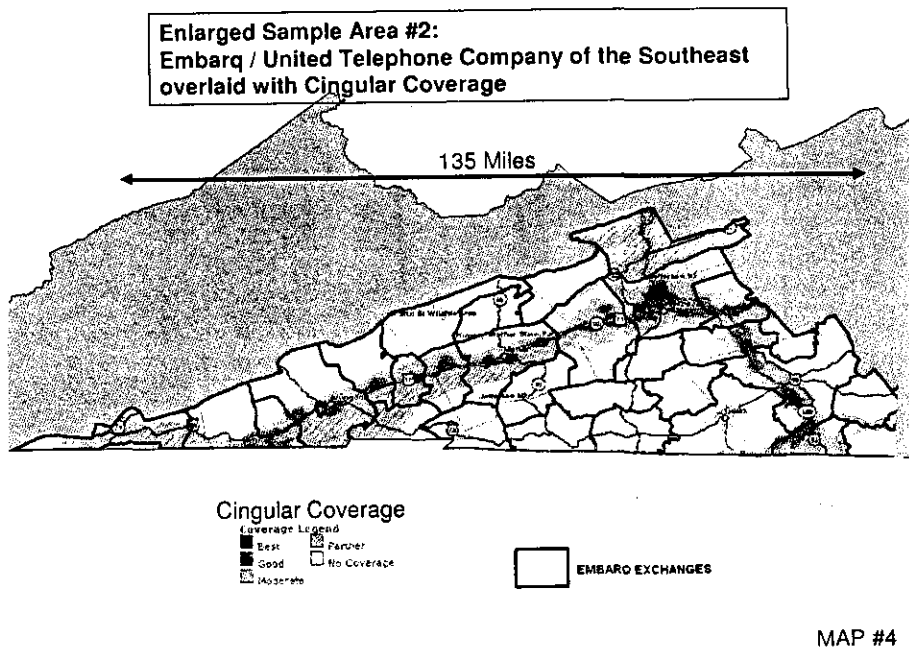
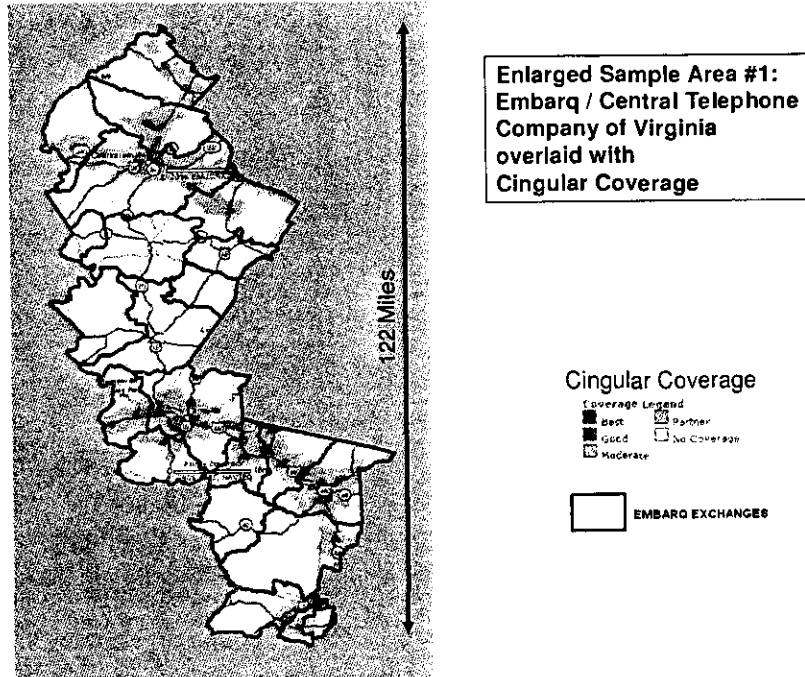
MAP #1

Embarq Serving Territory in Virginia



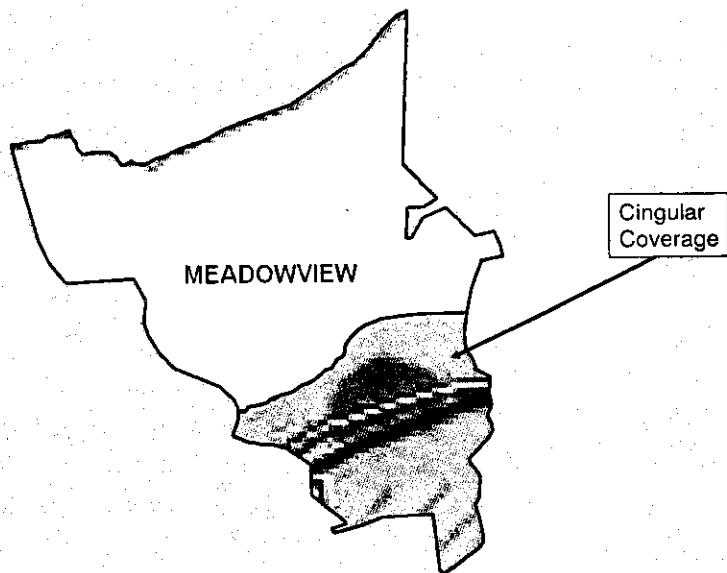
MAP #2

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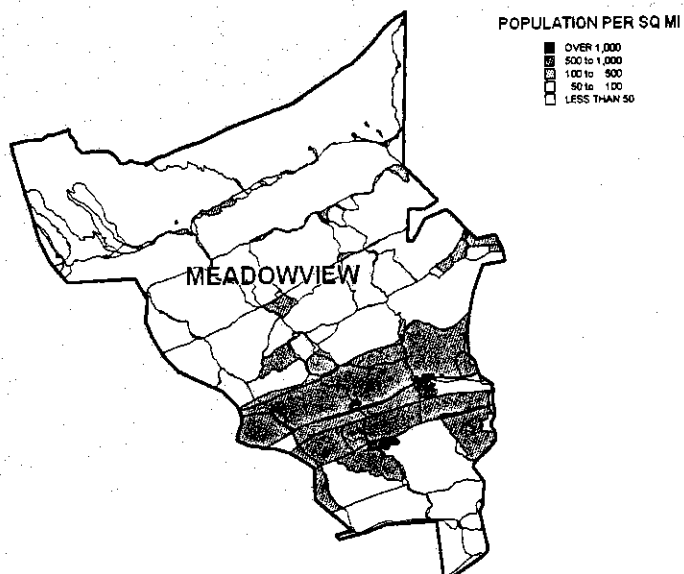


APPENDIX B

Meadowview Wire Center – Cingular Coverage

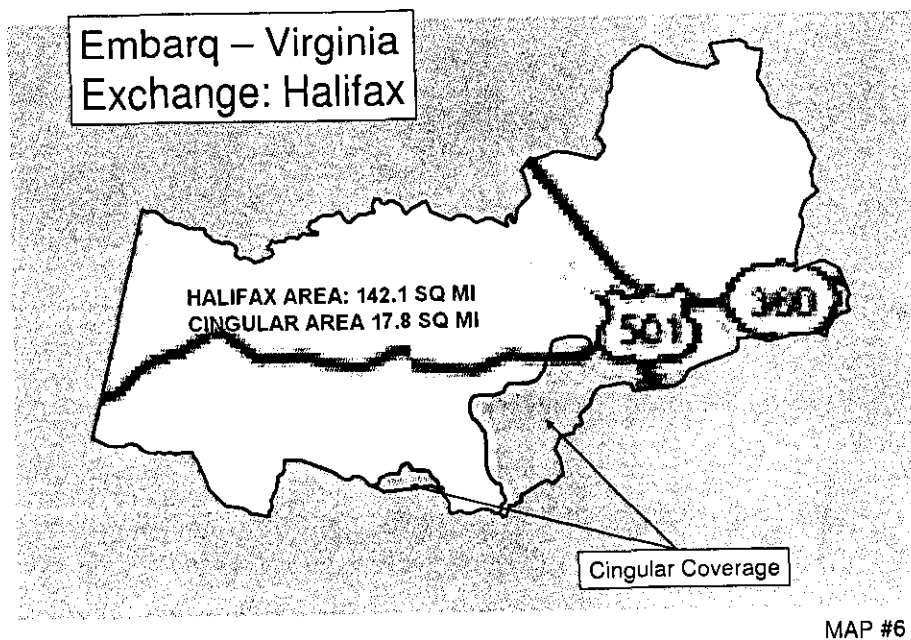
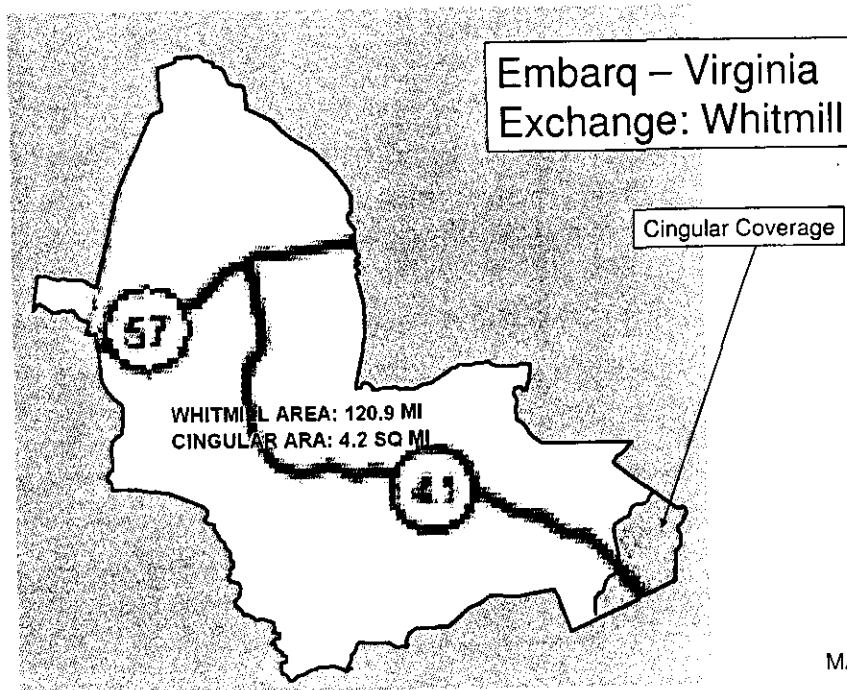


Meadowview Wire Center – Density by Census Block

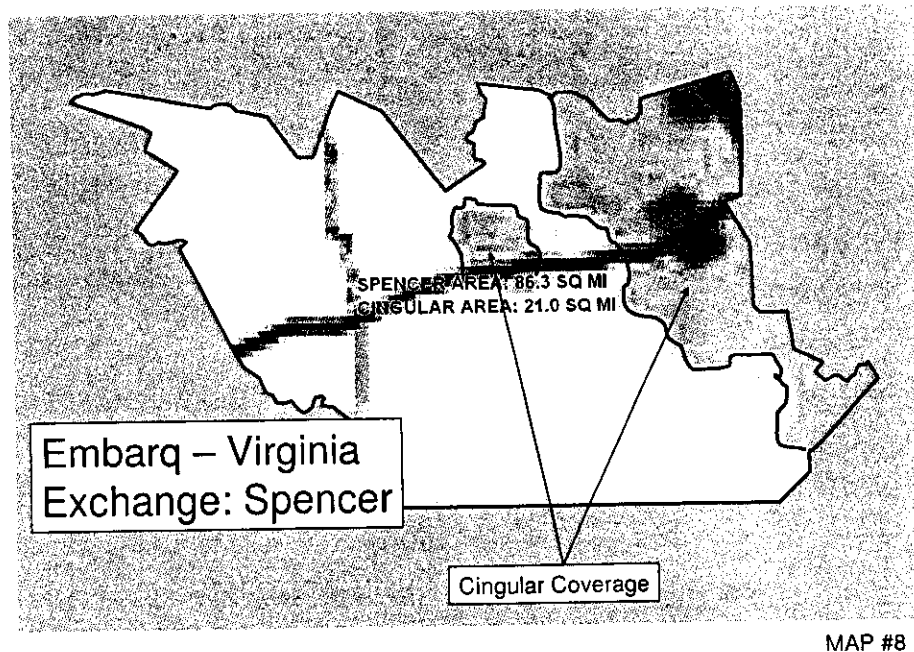
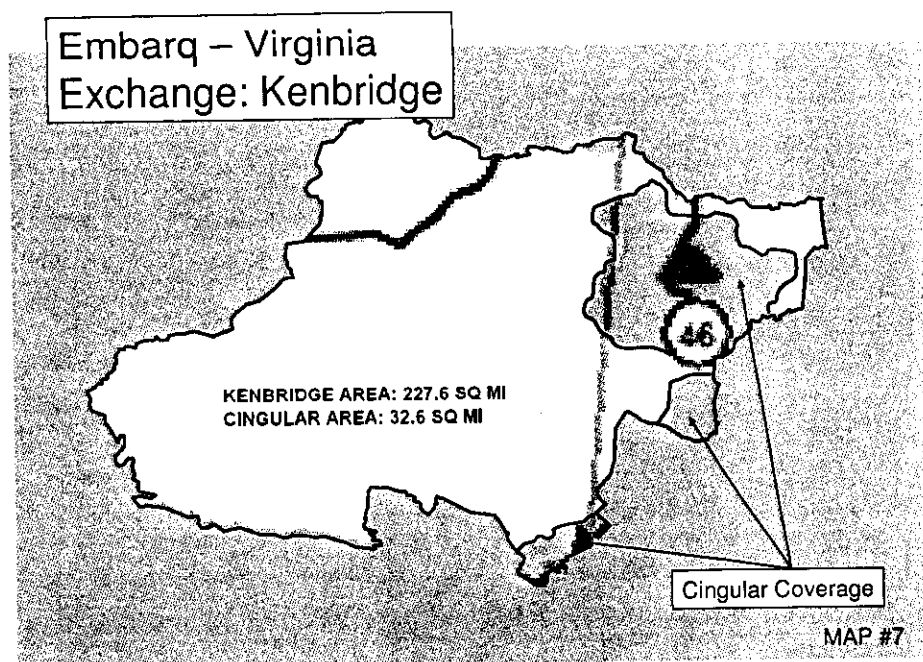


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APPENDIX C



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